IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-581

WILLIAM CAHN,

Petitioner,

against

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

FRANK A. FINNERTY, JR.
Attorney for Respondent
16 Court Street
Brooklyn, New York 11241
(212) 624-7851

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PRELIMINARY STATEMENT

Respondent's brief is submitted in opposition to the petition for a Writ of Certiorari to review an order of the Court of Appeals of the State of New York, entered on July 11, 1978, which dismissed petitioner's appeal to that court upon the ground that no substantial constitutional question was directly involved.

Previously, applications for leave to appeal to the Court of Appeals of New York from an order of the Appellate Division, Second Judicial Department, entered on October 24, 1977, which had struck petitioner's name from the roll of attorneys of the State of New York, had been denied by the Appellate Division on December 27, 1977 (A.12a) and the Court of Appeals on March 28, 1978 (A.15a).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

Petitioner was admitted to the practice of law in New York State on June 17, 1949 by the Appellate Division, Second Judicial Department. On July 2, 1976, after

a jury trial held in the United States District Court for the Eastern District of New York, respondent was adjudged guilty of forty-five (45) counts of an indictment which had charged him with ten (10) counts of making false statements (Title 18 U.S.C. 1001) and thirty-five (35) counts of mail fraud (Title 18 U.S.C. 1341), and sentenced as follows:

> "1 year and 1 day to run concurrent on counts 1 through 44. On count 45, imposition of sentence is suspended and the defendant is placed on 2 years unsupervised probation. The defendant is fined $2,500 to run concurrent on all counts."

On November 8, 1976, respondent's judgment of conviction was affirmed by the United States Court of Appeals for the Second Circuit, and on March 21, 1977, the United States Supreme Court denied petitioner's petition for a writ of certiorari on direct appeal from the judgment of conviction.

Based upon his conviction of federal felony crimes, petitioner's name was struck from the roll of attorneys and counsellors-at-law of the State of New York, by order of the Appellate Division, Second Judicial Department on October 24, 1977, pursuant to New York Judiciary Law Section 90, subdivision 4, which provides:

> "4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.
>
> Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys."

POINT ONE

PETITIONER'S NEW YORK DISBARMENT BASED UPON CONVICTION OF FEDERAL FELONY CRIMES DOES NOT VIOLATE DUE PROCESS, EQUAL PROTECTION AND EX POST FACTO PROVISIONS OF THE CONSTITUTION

Prior to March 5, 1940, an attorney was deemed disbarred and his name was stricken from the roll of attorneys upon conviction of any crime statutorily defined as a felony under the laws of New York, a sister State or of the United States pursuant to the then Judiciary Law, Section 88, subdivision 3 (renumbered Judiciary Law, Section 90, subdivision 4 [1945]).

On March 5, 1940, the New York Court of Appeals in *Matter of Donegan* (282 N.Y. 285) qualified the automatic disbarment statute to the following extent:

"Strict construction of section 88, subdivision 3 and section 477 of the Judiciary Law requires that the term 'felony' include only those Federal felonies which are also felonies under the laws of this State, and exclude such Federal felonies as are 'cognizable by our laws as a misdemeanor or not at all'" (supra at 292).

On October 13, 1977, in *Matter of Chu*, 42 N.Y.2d 490, a case involving automatic disbarment of an attorney convicted of violating Title 18 U.S.C. 1001, one of the federal statutes of which petitioner herein was similarly convicted, the New York Court of Appeals modified the *Donegan* case ruling and held:

"We conclude that conviction of an attorney for criminal conduct judged by the Congress to be of such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment. Whatever may have been the proper evaluation of a felony conviction in courts other than those of our own State in 1940 when *Donegan*

was decided, we now perceive little or no reason for distinguishing between conviction of a Federal felony and conviction of a New York State felony as a predicate for professional discipline. Certainly is this so when, as here, there is a New York State felony of substantially the same elements. When it is the underlying conduct of the attorney which calls for disciplinary response, it makes little sense to say that although that conduct has been defined as felonious throughout the nation under Federal law, the attorney is not to be automatically disbarred unless our State Legislature has enacted a precisely matching felony statute. To accord determinative significance to such statutory discrepancy would be to elevate insignificance."

The Court of Appeals in the *Chu* decision noted the similarity of the federal and state statutes proscribing the filing of false statements stating:

"Additionally in the present instance there is a very close, if not a precise, parallelism between the conduct proscribed by § 1001 and that proscribed by § 175.35. It does not strike us as significant for present purposes that under one statute the filing of the false

> statement must be with a department or agency of the United States while under the other filing must be in an office of the State or a political subdivision thereof.
>
> * * *
>
> The core of the offense under both statutes is the willful filing in a governmental office of a false statement knowing it to be false. In the present case we hold that such matching suffices."

The New York Court of Appeals on October 19, 1978, in *Matter of Thies,* ____ N.Y.2d ____, declined to reconsider its earlier *Chu* decision that conviction of a federal felony works an automatic disbarment, reiterating that it was "immaterial that there is no felony analogue under our State statutes matching the federal felony" and pointed out that "the validity of the concept of automatic disbarment as applied to New York felonies has long been upheld."

Petitioner's automatic disbarment is not violative of his constitutional guarantee of due process since that right was safeguarded throughout his jury trial in the federal court and upon the review of his conviction by the Circuit Court of Appeals for the Second Circuit. Petitioner seeks to review, in a civil disciplinary hearing, his conviction of federal felony crimes which has already been affirmed after appellate review and which the United States Supreme Court itself declined to consider upon his previous Petition for Certiorari.

Respondent recognizes that a state cannot exclude a person from the practice of law in a manner which contravenes the Fourteenth Amendment (*Schware v. Board of Bar Examiners,* 353 U.S. 232, 238) and that the power of a state to

regulate the practice of law may not be exercised in an arbitrary or discriminatory manner (*Koenigsberg v. Board of Examiners*, 353 U.S. 252, 273). The United States Supreme Court has defined specific Fourteenth Amendment guidelines, as follows:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 425-426; (see also: *Rankin v. Shankar*, 23 N.Y.2d 111, 119).

The legislature of New York has determined, in enacting Judiciary Law, Section 88, subdivision 3 (renumbered Judiciary Law, Section 90, subdivision 4 [1945]) that an attorney convicted of a felony crime is conclusively unfit to practice law and is automatically disbarred (*Matter of Keogh*, 25 A.D.2d 499, 500, mod on other grounds, 17 N.Y.2d 479). The purpose of the statute is clear, namely, to maintain high professional standards for members of the bar and to protect the public. The elimination from the bar of attorneys who have been found guilty of felonious conduct is reasonably related to that goal. As the New York Court of Appeals stated in *Matter of Mitchell*, 40 N.Y.2d 153, 156:

"In our view, this concern for the protection of the public interest far outweighs any interest the convicted attorney has in continuing to earn a livelihood in his chosen profession. Appellant, upon admission to the Bar, became an officer of the court, and, 'like the court itself, an instrument or agency to advance the ends of justice." *(People ex rel. Karlin v. Culkin,* 248 N.Y. 465, 471 [CARDOZO, J.].) To permit a convicted felon to continue to appear in our courts and to continue to give advice and counsel would not 'advance the ends of justice', but instead would invite scorn and disrespect for our rule of law. Justice BRADLEY, writing nearly one hundred years ago, expressed this same fear in language equally applicable to this case and particularly to this attorney: 'Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve.' (*Matter of Wall,* 107 U.S. 265, 274.)"

Petitioner contends that the automatic disbarment of attorneys convicted of a federal felony, due to the New York Court of Appeals ruling in *Matter of Chu,* 42 N.Y.2d 490, violates ex post facto provisions of the United States Constitution. An ex post facto law has been defined as one:

> "which imposes a punishment for an act which was not punishable when it was committed, or imposes additional punishment, or changes the rules of evidence, by which less or different testimony is sufficient to convict." (C.J.S. Constitutional Law Section 435 et seq.)

The constitutional limitation as regards ex post facto laws has long been held to apply solely to criminal statutes (*Baltimore & S.R. Co. v. Nesbit,* 51 U.S. 395; see also, *Mahler v. Eby,* 264 U.S. 32). Disciplinary proceedings have consistently been held to be civil in nature

(*Matter of Zuckerman*, 20 N.Y.2d 430, 438 [1967], cert. den. 390 U.S. 925 [1968], see also *Matter of Ungar*, 27 A.D.2d 925 [1st Dept. mem. 1967], cert. den. 389 U.S. 1007 [1967]).

Petitions for Writs of Certiorari have recently been sought by disbarred attorneys, based upon the same claims of constitutional infirmities of the New York Judiciary Law, Section 90, subdivision 4, and in each case the Supreme Court had denied the applications (*Peltz v. Joint Bar Association Grievance Committee*, 43 N.Y.2d 646, cert. den. May 3, 1978, ____ U.S. ____; *Davis v. Joint Bar Association Grievance Committee*, 44 N.Y.2d 641; cert. den. October 2, 1978 and *Rosenberg v. Joint Bar Association Grievance Committee*, 62 A.D.2d 1065, mot lv. to app. den. 44 N.Y.2d 648, cert. den. October 30, 1978, ____ U.S. ____).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: Brooklyn, New York
November 30, 1978

Respectfully submitted,

FRANK A. FINNERTY, JR.
Attorney for Respondent
16 Court Street
Brooklyn, New York 11241
(212) 624-7851